

# RULES OF PRACTICE AND PROCEDURE

United States Sentencing Commission ♦ July 1997



## Introduction

Pursuant to its authority under section 995(a)(1) of title 28, United States Code, the Sentencing Commission has established rules of practice and procedure relating to the manner in which it conducts its business. The Commission hereby gives notice of the adoption of these rules. These rules are effective as of their adoption by the Commission on July 11, 1997.

Section 995(a)(1) of title 28 authorizes the U.S. Sentencing Commission, an independent agency in the judicial branch of the United States Government, to establish general policies and promulgate rules and regulations for the Commission as necessary to carry out the purposes of the Sentencing Reform Act of 1984.

The rules of practice and procedure are designed to facilitate public understanding and participation in the work of the Sentencing Commission. For the most part, these rules do not represent a substantive change in the way the Commission has traditionally conducted its business. These rules are not intended to enlarge the rights of any person sentenced under the guidelines promulgated by the Commission or otherwise create any private right of action.

The rules were published for comment on July 29 and October 8, 1996. 61 FR 39493-96, 61 FR 52825-26. The Commission received public comment from a number of persons and groups. The Commission also conducted an informational hearing on June 4, 1997, at which time it received additional comment. The adopted rules reflect a variety of changes suggested by the public comment and hearing participants.

Authority: 28 U.S.C. § 995(a)(1).

Richard P. Conaboy  
Chairman

of title 5, United States Code, relating to publication in the Federal Register and a public hearing procedure, with regard to proposed sentencing guidelines or amendments thereto. See 28 U.S.C. § 994(x). The Commission is not subject to a variety of other statutes, such as the Federal Advisory Committee Act, the Sunshine Act, and the Freedom of Information Act, typically applicable to rulemaking agencies in the executive branch. The Commission nevertheless desires to involve interested members of the public in its work to the maximum extent practicable. Accordingly, these rules are issued for the purpose of more fully informing interested persons of opportunities and procedures for becoming aware of and participating in the public business of the Commission. These rules are not intended to enlarge the rights of any person sentenced under the guidelines promulgated by the Commission or to otherwise create any private right of action.

## Rule 1.2 – Rules Amendment Procedure

(a) Except as provided in subsection (b), amendment of these rules shall require the affirmative vote in a public meeting of a majority (and not less than three) of the voting members then serving. Any such amendment shall be adopted only after notice and reasonable opportunity for public comment.

(b) The Commission temporarily may suspend any rule contained herein and/or adopt a supplemental or superseding rule by affirmative vote in a public meeting of a majority of the voting members then serving.

## PART I - PURPOSE OF RULES; RULES AMENDMENT PROCEDURE

### Rule 1.1 – Application and Purpose

Pursuant to 28 U.S.C. § 995(a)(1) and other applicable provisions of its organizational statute, the United States Sentencing Commission (“the Commission”) has established these rules governing its usual operating practices. The Commission, an agency within the judicial branch of government, is subject to only that provision of the Administrative Procedures Act, section 553

## PART II - ACTION BY THE COMMISSION

### Rule 2.1 – Members

For purposes of the voting procedures set forth in these Rules, “member” of the Commission shall mean a voting member and shall not include an *ex-officio*, non-voting member. *Ex-officio* members may not vote or make or second motions.

## **Rule 2.2 – Voting Rules for Action by the Commission**

Except as otherwise provided in these rules or by law, action by the Commission requires the affirmative vote of a majority of the members at a public meeting at which a quorum is present. A quorum shall consist of a majority of the members then serving. Members shall be deemed “present” and may participate and vote in public meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.

Promulgation of guidelines, policy statements, official commentary, and amendments thereto shall require the affirmative vote of at least four members at a public meeting. *See* 28 U.S.C. § 994(a).

Publication for comment of proposed amendments to guidelines, policy statements, or official commentary shall require the affirmative vote of at least three members at a public meeting. The decision to instruct staff to prepare a retroactivity impact analysis for a proposed amendment shall require the affirmative vote of at least three members at a public meeting.

Action on miscellaneous matters may be taken without a meeting based on the affirmative vote, by written or oral communication, of a majority of the members then serving. Such matters may include, the approval of budget requests, legal briefs, staff reports, analyses of legislation, and administrative and personnel issues.

A motion to reconsider Commission action may be made only by a commissioner on the prevailing side of the vote for which reconsideration is sought, or who did not vote on the matter. Four votes are necessary to reconsider a Commission vote on any question on which a four-vote majority is required.

## **PART III - MEETINGS AND HEARINGS**

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### **Rule 3.1 – Meetings**

The Chair shall call and preside at Commission meetings. In the absence of the Chair, the Chair will designate a Vice Chair to preside.

### **Rule 3.2 – Public Meetings**

The Commission shall meet on at least two occasions in each calendar quarter to conduct business.

To the extent practicable, the Chair shall issue, through the Office of Staff Director, a public notice of any public meeting at least seven days prior to the date of the meeting. The public notice, to the extent practicable, shall indicate the general purpose(s) of the meeting and include an agenda and any related documents approved for public release.

At the discretion of the Chair, members of the public may be afforded an opportunity to comment on any issue on the agenda of a public meeting.

### **Rule 3.3 – Executive Sessions**

The Commission may hold executive sessions closed to the public to transact business of the Commission that is not appropriate for a public meeting, *e.g.*, discussion and resolution of personnel and budget issues.

### **Rule 3.4 – Briefing Sessions**

The Commission may hold briefing sessions that are not open to the public generally to receive in-depth information from staff and other persons. The Office of Legislative and Public Affairs will make available a list of issues upon which the Commission was briefed.

### **Rule 3.5 – Public Hearings**

The Commission may convene a public hearing on any matter involving the promulgation of sentencing guidelines or any other matter affecting the Commission’s business. A request for comment on a proposed matter does not necessarily mean that a public hearing will be held on the matter or that a public hearing, if scheduled, will pertain to all issues raised in the request for comment.

Notice of a public hearing shall be given as soon as practicable. The notice shall include, as applicable, information regarding a procedure for requesting an opportunity to testify, and the availability of documents or reports relevant to the subject of the hearing.

The Commission may specify the format for public hearings, invite witnesses, choose witnesses from among those who request the opportunity to testify, and require that written testimony be submitted in advance of the hearing.

The Commission may exclude from such a hearing any electronic devices that record the voice or image of any or all witnesses, as well as cameras of any kind.

At the request of any witness to turn off any such electronic device(s) during that person's testimony, the Chair of the Commission may order, at his or her discretion, that use of such devices be discontinued during the testimony of that witness.

### **Rule 3.6 – Written Record of Meetings and Hearings**

The Commission shall prepare and maintain written minutes of public meetings and make them publicly available after their approval by the Commission. The Commission shall tape record public meetings and make the recordings publicly available after the approval of the minutes of such meeting. No such recording shall be copied or removed from the Commission's offices.

The Commission shall maintain a written transcription of public hearings that shall be publicly available for inspection.

## **PART IV - GUIDELINE AMENDMENT PROCESS**

### **Rule 4.1 – Promulgation of Amendments**

The Commission may promulgate and submit to Congress amendments to the guidelines after the beginning of a regular session of Congress and not later than May 1 of that year.

Amendments shall be accompanied by an explanation or statement of reasons for the amendments. Unless otherwise specified, or unless Congress legislates to the contrary, amendments submitted for review shall take effect on the first day of November of the year in which submitted. 28 U.S.C. § 994(p).

At other times, pursuant to special statutory enactment, the Commission may promulgate amendments to accomplish identified congressional objectives.

Amendments to policy statements and commentary may be promulgated and put into effect at any time. However, to the extent practicable, the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year. Generally, promulgated amendments will be given prospective application only. However, in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants, it shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment. Prior to final Commission action on the retroactive application of an amendment, the Commission shall review the retroactivity impact analysis prepared pursuant to Rule 2.2, *supra*.

### **Rule 4.2 – Prison Impact of Amendments**

Prior to promulgating amendments to the guidelines, the Commission shall consider the impact of any amendment on available penal and correctional resources, and on other facilities and services and shall make such information available to the public.

### **Rule 4.3 – Notice and Comment on Proposed Amendments**

In proposing and promulgating guidelines and amendments thereto, the Commission shall comply with the requirements of section 553 of title 5, United States Code, relating to publication in the Federal Register and public

hearing procedure. 28 U.S.C. § 994(x).

The Commission may promulgate commentary and policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x). Nevertheless, the Commission will endeavor to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments.

#### **Rule 4.4 – Federal Register Notice of Proposed Amendments**

A vote to publish a proposed amendment to a guideline, policy statement, or official commentary in the Federal Register shall be deemed to be a request for public comment on the proposed amendment. At the same time the Commission votes to publish proposed amendments for comment, it shall request public comment on whether to make any amendments retroactive.

The notice of proposed amendments also shall provide, to the extent appropriate and practicable, reasons for consideration of amendments and a summary of or reference to publicly available information that is relevant to the issue(s). In addition, the publication notice shall include a deadline for public comment and may include a notice of any scheduled public hearing(s) or meetings on the issue(s).

In the case of proposed amendments to guidelines or issues for comment that form the basis for possible guidelines amendments, the Commission shall allow, to the extent practicable, a minimum period of public comment of at least 60 calendar days prior to final Commission action on the proposed amendments.

#### **Rule 4.5 – Public Hearing on Proposed Amendments**

In the case of “emergency” amendments issued pursuant to special statutory authorization, the Commission ordinarily will not conduct a public hearing on the proposed amendments but will afford such opportunity for written comment as time allows.

In the case of other amendments to guidelines or policy statements issued pursuant to 28 U.S.C. § 994, the Commission shall conduct a public hearing on the proposed amendments, unless the Commission determines that time does not permit a hearing or that a hearing will not substantially assist the amendment process. Notice of the hearing shall be given in the Federal Register and by other means designed to inform persons likely to be interested in participating in such a hearing.

### **PART V - PUBLIC PARTICIPATION IN GUIDELINE AMENDMENT PROCESS**

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#### **Rule 5.1 – Public Comment File**

The Office of Legislative and Public Affairs shall receive and maintain public comment and public hearing testimony received by the Commission. This public comment file will be available during normal business hours for public inspection pursuant to written or telephonic request and with reasonable notice.

#### **Rule 5.2 – Notice of Priorities**

The Commission shall publish annually in the Federal Register and make available to the public a notice of the tentative priorities for future Commission inquiry and possible action, including areas for possible amendments to guidelines, policy statements, and commentary. Any such notice shall include an invitation to, and deadline for, the submission of written public comment on the proposed priorities.

#### **Rule 5.3 - Data and Reports Relevant to the Amendment Process**

To fulfill Commission priorities and inform consideration of potential amendments, the Staff Director shall direct the preparation of relevant data and reports for consideration by the Commission. Upon authorization, the Office of Legislative and Public Affairs shall make the data and reports available to the public as soon as practicable.

#### **Rule 5.4 – Advisory Groups**

Upon authorization of the Commission, the Staff Director may facilitate the creation, membership, and periodic meeting at the Commission offices and elsewhere, of advisory groups of defense attorneys, academics, probation officers, judges, prosecutors, and others, to facilitate formal and informal input to the Commission.

Two types of advisory groups are authorized: standing and ad hoc. The following groups are standing advisory groups: the Practitioners' Advisory Group and the Probation Officers' Advisory Group.

Upon creating an advisory group, the Commission may prescribe such policies regarding the conduct of meetings and operation of the group as the Commission deems necessary or appropriate. The Commission also may delegate to an advisory group the responsibility for developing such policies.

In addition, the Commission expects to solicit input, from time to time, from outside groups representing the federal judiciary, prosecutors, defense attorneys, crime victims, and other interested groups.

### **PART VI - INFORMATION ABOUT THE COMMISSION**

#### **Rule 6.1 – Office(s)**

The offices of the Commission are located in the Thurgood Marshall Federal Judiciary Building, Suite 2-500, South Lobby, One Columbus Circle, N.E., Washington, D.C. 20002-8002.

The office can be reached by telephone between 8:30 a.m. and 5:30 p.m., Monday through Friday. The main telephone number is (502) 502-4500. The fax number is (202) 502-4699.

#### **Rule 6.2 – Office of Legislative and Public Affairs**

The Office of Legislative and Public Affairs administers the Commission's policy on Public Access to Sentencing Commission Documents and Data. See 54 FR 51279 (1989). This office also maintains A Guide to Publications & Resources that lists all publications and datasets available from the Commission. This document is available on request.

Generally, the Office of Legislative and Public Affairs will maintain for public inspection by appointment official Commission documents, meetings and hearing schedules and agendas, approved minutes of Commission meetings and transcripts of public hearings, public comment submissions, and other documents (or citations thereto) that inform Commission decisions or actions.

#### **Rule 6.3 – Internet Site**

The Commission maintains and updates information and documents on an Internet web site. The web site is found at <http://www.ussc.gov>. This resource includes general information, such as background information about the Commission and Commissioners, notices for scheduled meetings and hearings, minutes of recent meetings, transcripts of public hearings, listings of Commission priorities and projects, outstanding public comment solicitations, recently promulgated amendments, the text of numerous reports and resources available from the Commission, and the text of the Guidelines Manual and Commission reports.

#### **Rule 6.4 – Information at Federal Depository Libraries**

Commission publications printed by the Government Printing Office, and other selected documents, are available in hard copy or microfiche form through the Government Printing Office's Depository Library system. The location of the nearest Federal Depository Library can be determined in several ways: (1) by requesting a free copy of the Directory of Depository Libraries from the U.S. Government Printing Office, Library Programs Services, Stop: SLLD, Washington, DC 20401; (2) by asking at any local library for the address of the nearest Federal Depository

Library; or (3) by using the Internet at [http://www.access.gpo.gov/su\\_docs](http://www.access.gpo.gov/su_docs); “Information Available for Free Public Use in Federal Depository Libraries” should be selected. The listing may be searched by state or by area code.

**Rule 6.5 – Access to Commission Data —  
Research Consortium**

The Commission provides its various databases, excluding individual identifiers, to the University of Michigan's Inter-University Consortium for Political and Social Research (ICPSR). Researchers interested in studying federal sentencing practices through quantitative methods can access Commission sentencing data through this means. Contact ICPSR, P.O. Box 1248, Ann Arbor, MI 48106; or call 1-800-999-0960; or use the following Internet address:

<http://www.ICPSR.umich.edu/NACJD/home.html>. **P**